

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

BVIHCR2015/0020

BETWEEN:

THE QUEEN

and

MATTHEW HAZEL

Appearances:

Ms. Leslie Ann Faulkner, Senior Crown, Ms Melissa Brewley and Ms Anjel Flax
Crown Counsels for the Crown

Mrs Valerie Stepens of GRR Gordon with Mr Michael Maduro of Grace Chambers
for the Defendant

2017: May 2nd
: May 15th

SENTENCING REMARKS

[1] **BYER J.:-** After a trial on an indictment for attempted murder, attempted robbery, possession of a firearm with intent to commit an indictable offence and possession of explosives against the defendant the jury found the defendant on the 31st March 2017 guilty of all the charges.

[2] On the delivery of the verdict the sentencing hearing was adjourned to facilitate the court having the benefit of a Social Inquiry Report on the defendant and for the court to be seized of all pertinent information regarding his sentencing. The hearing was convened on the 2nd May 2017 and judgment was reserved.

The Background facts

- [3] The facts in précis were that the complainant D'urville Carty, a member of the Royal Virgin Islands Police Force, was contacted on the evening of the 16th February 2015 by the security officer of the One Mart Supermarket to assist in the deposit of the day's takings. Mr Carty agreed and although he was not on roster that night for duty, his evidence to the jury was that he placed himself on duty and retrieved his force issued firearm and attended the premises of the One Mart supermarket. He collected the takings for the day and transported the same to the First Caribbean International Bank for deposit. At the depository just before he made the deposit, he was confronted by a lone gun man who had covered his face with a mask. The gun man discharged the firearm in his possession three times at Mr Carty while demanding the money. In the heat of the exchange Mr Carty was able to retrieve his own weapon, which was concealed on his person, returned fire and pursued the assailant but lost him. The crown relied on CCTV footage retrieved from the area of the bank, the Peebles Hospital and the environs of Road Town which captured the movement of a vehicle admittedly driven by the defendant and that defendant's attendance at the Hospital suffering from a gunshot wound that same night. The crown also relied on DNA evidence obtained from the mask that was identified as the one being worn by the assailant which had the DNA of the defendant. The defendant's defence was that he was an innocent civilian who got caught in the cross fire of the altercation between Mr Carty and the assailant. He maintained his innocence throughout the trial. This defence was resoundingly rejected by the jury who with unanimous verdicts, found the defendant guilty of all the offences as charged.

The Plea in Mitigation

- [4] Counsel for the defendant Mrs. Gordon made a strong plea in mitigation.
- [5] Mrs. Gordon informed the court of the particulars of her client of his age, now 25 years old, 23 at the time of the commission of the offences. She told this court that her client understood that seriousness of the offences but she submitted that the fact that they were serious did not mean that the court could also not be merciful. She therefore asked that this court in any sentence that is passed be a just one tempering justice with mercy.
- [6] Counsel's essential submission was that her client should be entitled to the entire benefit of his youthful age and previous good character. Counsel submitted to this court that the overall impression of the contents of the Social Inquiry Report, the Prison Report and the evidence of his witnesses at trial that remained uncontradicted, was that the acts that her client were found guilty of, were out of character. She asked this court to consider what had been said about him and that the weight of his character ought not to be disregarded but rather count heavily in his favour.

Crown's submissions

- [7] The Crown presented comprehensive written submissions and oral submissions to this court on the sentencing guidelines that they wished the court to consider.
- [8] In those submissions the crown identified for the court what it considered as the aggravating and mitigating factors of these offences and sought to compartmentalize the same according to the offences as were charged and upon which the defendant was ultimately convicted.
- [9] These were identified as the following:

Aggravating Factors

Common Aggravating Factors for all three offences:

- (1) The act was premeditated
- (2) High value goods or sum of money targeted
- (3) Lack of remorse

Attempted Murder

- (1) The virtual complainant was providing public assistance as is his duty as an officer.

Attempted Robbery

- (1) The choice of weapon namely a firearm was used to execute the Robbery and same was discharged three times.
- (2) Concealed identity, (use of mask)
- (3) Timing of the offence (after 12:00 midnight)

Possession of firearm with intent to commit an indictable offence (see R v. Avis guidance below as applied in Kashorn John)

- (1) Prevalence of the offence with the use of guns
- (2) Firearm was discharged repeatedly (three times)
- (3) Firearm was loaded with at-least three bullets. (Sergeant Carty heard three shots and three shot gun casings were recovered)

Mitigating Factors

- (1) Age of the Defendant
- (2) Previous good character

[10] Generally for the entire matter, the crown submitted that the aggravating factors, far outweighed the two mitigating factors and on that basis they submitted that this being a particularly serious crime with the apparent disregard for the safety and life of the complainant and that any sentence given by this court must reflect the same.

Social Inquiry Report

- [11] At the end of the trial and upon the verdict being given, counsel for the defendant requested the preparation of a social inquiry report which was agreed to by the crown.
- [12] The report made it clear that the defendant maintained throughout the interview that he was not involved in the incident in which the complainant Mr Carty was shot at in the course of a robbery. His statement to the social worker was that he did not think they had the “right evidence to put forward that he did it” but he gave no explanation as to why his name arose in the inquiries or was ultimately accused of these offences.
- [13] By all accounts it appears that these offences were outside any usual or normal behaviour for the defendant and his former supervisor at the First Caribbean International Bank where he worked at the time of the incident, told the social worker that she was taken aback when she learnt that the defendant had been involved in the offences and that she considered it “out of character”.
- [14] The defendant was generally was assessed as having been afforded every opportunity to excel both socially and academically with no contra indications that he needed to place himself in this scenario that brought him before the court.
- [15] It was noted that there was no specific expression of remorse in light of the fact that he maintained his innocence but neither did he express to the Social Worker any remorse for the incident occurring at all.

Victim Impact Assessment

- [16] The court was also privy to a victim impact statement from the complainant that highlighted what occurred subsequent to the incident. By this document Mr Carty

informed the court that immediately posts the incident he was sent on administrative leave and sought the assistance of the services of Dr June Samuel a psychiatrist at the hospital. Since then, he has returned to work but when he is working to appease the anxiety also shared by his partner he would often times have to make quick visits to the home to reassure her that all was well. He also indicated that he was the subject of threats on his life from individuals identified as acquaintances of defendant. There was however no indication that this was ever followed up or confirmed and in that regard the court will place no weight on the same.

Court's Consideration and analysis

Attempted Murder

[17] By Section 152 of the Criminal Code: “***any person who by any means attempts to commit murder is liable on conviction to imprisonment for life***”.

[18] This however must be read together with Section 23(1) of the Criminal Code which further provides that “***a person liable to imprisonment for life or any other period may be sentenced to a shorter term, except in the case of a sentence passed in pursuance of Section 150***” which refers to a conviction for murder.

[19] With these parameters in mind it is clear that this Court like any other sentencing Court must always bear in mind the guiding principles to be brought to bear on any sentencing exercise. As stated by Byron CJ as he then was in the now considered seminal case of **Desmond Baptiste v The Queen**¹ these are identified as retribution, deterrence, prevention and rehabilitation. “***The main purpose of the criminal sanction is to protect the public. Built into this overarching purpose are the concepts of deterrence and retribution in the sense not of revenge but of “a measured social response to the harm done to the society by the***

¹ Hct Crim App 8/2003 SVG

offender” which are both aimed at ensuring that the wrongdoer does not repeat the offence and that potential wrongdoers get the message that society will not condone or tolerate certain acts. There is also the important aspect of rehabilitation which is the more humane consideration when sentencing an offender”²

- [20] It is indeed to be noted that the penalty for murder is the same as for attempted murder and it is equally clear that whereas in murder the Crown has the option of proving either an intention to kill or an intention to cause grievous bodily harm, in attempted murder the only intention to be proven is an intention to kill. ***“Accordingly an offender convicted of this offence will have demonstrated a high level of culpability.”³***
- [21] Be that as it may, every incident and every offender has to be taken on an individual basis and as such each set of circumstances can give rise to a range of injuries and concomitantly, sentences.
- [22] It is therefore incumbent upon this court as the sentencing court to assess all the instances that impact upon this case and thereby determine the final sentence.
- [23] By paragraph 9 above the crown identified the aggravating factors that were common for all offences and additionally the one identified for attempted murder of the complainant carrying out a public service at the time as was his duty as a police officer.
- [24] Thus it is clear from the crown’s perspective that the aggravating factors outweigh the mitigating almost two to one.

² Per Joseph- Olivetti J in **The Queen v Patrice Grant** BVI Crim. 19/2005 paragraph 26

³ Sentencing Guidelines Council: Attempted Murder – Definitive Guideline

- [25] With that ratio this court must therefore undertake a considered view of all the circumstances of this case in coming to its final decision.
- [26] All the authorities to which this court has been directed to by the Crown clearly show a range of sentences that can be imposed on offenders who have been found guilty of this offence.
- [27] Although it is now readily accepted in this region that the United Kingdom Sentencing Guidelines as produced by the United Kingdom Sentencing Council are not to be followed slavishly, they do in this court's mind still offer useful indicators with regard to the sentences that can be imposed for any particular offence.
- [28] In this regard this court recognizes that there are efficient guidelines set down for the sentencing for attempted murder.
- [29] The guidelines provide three different levels of sentencing ranges whereby Level One provides for the most serious offences in which if they had been convicted of murder fell within the parameters of Sections 4 and 5 of the Schedule 21 of the Criminal Justice Act 2003. Level two encapsulated "other planned attempts to kill" and Level Three "other spontaneous attempts to kill".
- [30] Under each of those levels there is a further division where it is clear that there is accommodation made for the various lengths of sentences depending on whether there existed i) serious and long term physical or psychological harm; ii) some physical or psychological harm; iii) little or no physical or psychological harm.
- [31] In the case at Bar, I am in agreement with counsel for the crown that having considered the facts of this case where there were no injuries and little or no

psychological harm to the complainant, that this action of the defendant that fateful night in February 2015 falls between Level 2 and Level 3.

[32] Having so found I now move on to the next phase.

[33] This involves by necessity an assessment of the level of culpability of the offender. These have been commonly referred to as the aggravating and mitigating factors that exist in any given matter.

[34] Having duly considered the factors as stated by the crown, I find that I am in agreement with the crown with all of the same to this offence save and except the lack of remorse and the complainant as a police officer as factors that have aggravated the carrying out of these offences.

[35] As it relates to the reported lack of remorse, I do not agree that this is an aggravating factor in circumstances where the defendant has clearly stated that he did not do this act albeit accepting the verdict of the jury. As counsel for the defendant submitted and with which this court agrees, the defendant has been consistent throughout and it would be extremely disingenuous that he now utter regret or remorse.

[36] Further in relation to the submission made by the crown that the virtual complainant having been a police officer added to the aggravation of this incident, the court disagrees.

[37] In this court's mind, for this to have amounted to an aggravating factor, the defendant would have had to know, at the time of the committing the offences, that the complainant was a police officer. For example where police officers respond to an event and are identified as police officers and the defendant nevertheless commits a criminal act against them. Or where perhaps a police officer identifies himself *ab initio* and the defendant still takes a criminal path. In the instant case,

the evidence led, clearly indicated that it was not until a chase ensued between the complainant and the defendant that the complainant identified himself as a police officer.

[28] In my assessment therefore, even with the rejection of the factors as identified above, it is still clear that the aggravating factors heavily outweigh the mitigating factors of youth and lack of previous convictions.

[29] Additionally even though youth and the lack of previous convictions can in some cases have a substantial counter effect to aggravating factors it has now been widely accepted that these are of little relevance “...**when the Court is dealing with cases of this gravity**”⁴.

[30] In this case however, I find that this defendant has not manifested nor has it been suggested that this defendant is on a career criminal path that warrants a sentence on the higher end of the scale.

[31] That being said and considering the aims of sentencing as they apply to this defendant, I am therefore satisfied that the inevitable custodial sentence will not have to be inordinately lengthy to achieve the desired effect of not only adequately punishing this defendant but satisfying the needs of society in this situation.

Attempted Robbery

[32] Under section 210 of the Criminal Code 1997, the penalty for the completed offence of robbery is life imprisonment and there is no specific legislative provision for the offence of an attempt. However by section 317 of the Criminal Code provision is made for the following:

⁴ Per Lord Lane CJ in Turner v The Queen [1975] 61 Crim. App Rep. 67 cited with approval by Byron CJ in Desmond Baptiste

“(1) Any person who attempts to commit an offence, commits an offence and is, unless any other punishment is provided by this Code or any other law, liable on conviction ,

(a) If the completed offence is punishable by imprisonment for life, or for ten years or more to imprisonment for a term not exceeding seven years;...”

[33] It is therefore clear that the sentence attached to the act of attempted robbery is maximum seven years.

[34] In this regard the jury accepted the crown's version of what transpired with the defendant and the complainant and the setting provided for the entire incident: that is was all about the planned robbery of the takings of One Mart Supermarket.

[35] Indeed the mere fact that the masked assailant appeared minutes before the attempted deposit within the precincts of the Bank on CCTV made it abundantly clear to this court that the source of attention was those funds. The zealotness, in this court's mind to acquire those funds, led to the entire sequence of events that night.

[36] Indeed the aggravating factors attached to this offence by the crown, with which this court agrees, as to the use of a firearm which was discharged, the concealing of their identity with the use of a mask and the time at which this offence occurred are all to be considered in the sentence that is to be determined.

[37] That being said, I consider that this act was the catalyst for the entire unfortunate night and any sentence must reflect that.

Possession of a firearm with intent to commit an indictable offence: robbery

[38] All of the courts both regionally and internationally recognize the “**concern of the public for the alarming incidence of firearm related crime**”⁵. It is widely recognized that Parliament by its stipulated penalties has sent the message to the public that crimes of this nature will not be tolerated.

[39] Indeed “the ease of availability and unbridled use of illegal firearms has become a distinct problem for law enforcement officers and the public at large “⁶

[40] Thus by Section 27B (1) of the Firearms Ordinance Cap 126 as amended , a person who is convicted of the offence of possession of a firearm with the intent to commit an indictable offence is liable to imprisonment for 20 years.

[41] There can be no other indicator that the nature of this crime is frowned upon by the very people who have brought it into law.

[42] In the case of R v Grant Wilkinson⁷ it was clearly stated that “**the gravity of gun crime cannot be exaggerated. Guns kill and maim, terrorise and intimidate. That is why criminals want them; that is why they use them: and that is why they organize their importation and manufacture, supply and distribution. Sentencing courts must address the fact that too many lethal weapons are too readily available: too many are carried: too many are used and always with devastating effect on individual victims and with insidious corrosive impact on the wellbeing of the local community.**”

[43] In this instant case, it is clear from the evidence that the firearm that was recovered and which the jury accepted had been in the possession of the

⁵ Per Byron CJ in Desmond Baptiste at paragraph 32

⁶ Per Cumberbatch J in The Queen v Sherryland Moses SLUCRD2010/0778 at paragraph 9

⁷ [2010] 1 Cr App. R 100 per Lord Judge CJ

defendant was the weapon that perpetrated the offences of attempted murder and attempted robbery. It is also clear that the jury accepted and believed that not only was the complainant shot at but that he was shot at by an individual whose only intention having the firearm was to commit the act of robbery.

[44] From the authorities provided to this Court in submissions it can be seen that the law relating to gun crime has evolved from pats on the wrists to lengthy periods of incarceration a clear indication of the recognition of the aversion to crimes of this nature.

[45] Indeed it was the crown who usefully provided the statistics for offences related to guns within the jurisdiction and it is clear to this court, that over a period of three years in a population of just over twenty thousand people, the ability to access a gun and retain it in your possession is on the rise.

[46] Therefore in order to assess the utilization of firearms in any particular offence, it was recognized in the case of **Grant Wilkinson** that there were a series of questions that need to be answered by the sentencing court. These questions were first itemized in the case of **R v Avis**⁸. These have been identified as follows: what sort of weapon is involved- real or imitation/loaded or unloaded; what if any use was made of the firearm- take into consideration all the circumstances regarding the use is important; what was the intention if any to possess the firearm- that is what has been proven regarding the intent and what is the defendant's record- that is what are his antecedents generally and specifically firearms or violent crime.

[47] It was submitted by the crown and I am in agreement with that submission, that in relation to the defendant that three of those four questions can be answered as against him. In that he had a real gun, the firearm was discharged and the

⁸ [1998] 2CAR 128

intention was to commit the act of robbery. It must also be noted however that the defendant has no previous convictions of any kind.

[48] Therefore from the authorities presented to the court the one that is closest in all the circumstances to the present case was the relatively recent case of **R v Tim Daley**⁹ a judgment of my sister Ellis J who imposed a sentence of 4 years on a young man who had not caused injury to anyone but had shot in the air during a robbery. However the court bears in mind that the main distinguishing fact was that this was on a plea of guilty and the court found that the mitigating factors outweighed the aggravating factors as identified.

[49] If the court therefore uses the comprehensive considerations as stated in the **R v Avis** case it is clear that the answers that were given in the affirmative to the questions amount to and are the aggravating circumstances in this instant case. The defendant used a real loaded firearm which was discharged at the complainant in circumstances that had only one purpose that is, to effect the act of robbery.

[50] On the other side with the mitigating factors, youth does play a part here with this defendant. It was emphasized in the impassioned plea in mitigation that this defendant was a young man with no other convictions of any kind and in this court's opinion that must weigh heavily in his favour. From all accounts this offence as with the others was not at all in keeping with the character of the defendant and this court is persuaded by this fact.

[51] Additionally this defendant was also charged and convicted of possession of explosive contrary to section 26 of the Explosives Ordinance Cap 124 which carries with it, being a summary offence, a penalty of a fine of \$500.00 or imprisonment for six months.

⁹ BVIHCR2014/0005

Sentence

- [52] In considering the sentences to be given to this defendant, this court must consider his overall criminality. There is no evidence that this defendant is pre disposed for re-offending and what evidence we do have is that of a positive good character of the defendant.
- [53] The evidence in its simplest form showed that this defendant showed up to rob the complainant with a firearm, used it to try to effect that goal, was unsuccessful and was discovered.
- [54] Given that scenario this court is ever mindful of the aims of sentencing and the manner in which these offences arose and is satisfied that custodial sentences are mandated.
- [55] Thus I mirror the words with approval from Ellis J in **Tim Daley**¹⁰ that “the courts have a role to play in ensuring that the citizens are protected from criminals. In that vein, sentences which are passed must be aimed at ensuring that the wrongdoer does not repeat the offence and that potential criminals get the message that society will not countenance such criminality.”
- [56] I therefore sentence the defendant as follows:
- i. In respect of count 1 the defendant is sentenced to 9 years
 - ii. In respect of count 2 the defendant is sentenced to 4 years
 - iii. In respect of count 3 the defendant is sentenced to 6 years
 - iv. In respect of count 4 the defendant is reprimanded and discharged

¹⁰ Per paragraph 43